

Don't You Forget About Me: The Continuing Viability of the FCPA's Facilitating Payments Exception

MICHAEL S. DIAMANT* & JESENKA MRDJENOVIC†

TABLE OF CONTENTS

I.	INTRODUCTION	19
II.	WHAT PAYMENTS QUALIFY AS “FACILITATING” OR “EXPEDITING” UNDER U.S. LAW?	21
III.	INTERPRETATION OF THE FACILITATING PAYMENTS EXCEPTION IN ENFORCEMENT ACTIONS	24
IV.	CONCLUSION	26

I. INTRODUCTION

At the heart of the Foreign Corrupt Practices Act (FCPA) lie the statute's anti-bribery provisions, which prohibit providing or offering “anything of value” to a “foreign official,” a “foreign political party,” or an official of a foreign political party with the corrupt intent to influence the recipient in order to obtain, retain, or direct business.¹ However, as the FCPA's legislative history makes clear, Congress did not intend to prohibit *all* payments to foreign officials.² Instead, from its inception, the FCPA's coverage has not “extend[ed] to so-called grease or facilitating payments.”³

Nonetheless, the recent actions of several international organizations and countries may be encouraging U.S. authorities to try to invoke a narrow interpretation of the FCPA's exemption for facilitating payments despite its clear legislative history. Although the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as adopted included a facilitating payments exception,⁴ the Organization for Economic Cooperation and Development (OECD) reversed course in 2009, recommending

* Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C.

† Associate, Gibson, Dunn & Crutcher LLP, Washington, D.C.

¹ 15 U.S.C. § 78dd-1(a) (1998); *see also* 15 U.S.C. § 78dd-2(a) (1998); 15 U.S.C. § 78dd-3(a) (1988).

² H.R. REP. NO. 95-640, at 4 (1977); S. REP. NO. 95-114, at 10 (1977).

³ 123 CONG. REC. 36,304 (daily ed. Nov. 1, 1977) (statement of Rep. Robert C. Eckhardt). For a discussion pertaining to what “grease” or “facilitating” payments are, *see infra* Part II.

⁴ Org. of Econ. Cooperation and Dev. [OECD], *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at art. 1, ¶ 9 (Nov. 21, 1997) (entered into force Feb. 15, 1999), *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (“Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence.”).

that member-countries discourage the use of small facilitation payments.⁵ The United Kingdom passed its Bribery Act in 2010 without an exception for such payments.⁶ And Russia enacted a new landmark anti-bribery law in 2011, which according to the Russian authorities, omits an “exception to the offence for ‘small facilitation payments.’”⁷

These developments have not been lost on U.S. regulators. For example, one U.S. Securities and Exchange Commission (SEC) official (writing in his personal capacity) argued that “while the FCPA contains several core provisions that will always withstand the test of time, the facilitation payments exception is out of date in this modern-day era of commerce and sensibility.”⁸ Indeed, he predicted that the facilitating payments “exception will eventually be eliminated” formally in response to “international pressure.”⁹ Many practitioners, examining FCPA enforcement actions, wonder if U.S. authorities have not already effectively read the exception out of the statute.¹⁰ These

⁵ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at VI (Nov. 26, 2009), available at www.oecd.org/dataoecd/4/18/38028044.pdf.

⁶ Bribery Act, 2010, c. 23 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>; MINISTRY OF JUSTICE, THE BRIBERY ACT 2010—GUIDANCE, at ¶ 44 (U.K.), available at www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf. China also recently amended its criminal law to prohibit foreign bribery. See Richard Meyer, *China Passes Anti-Bribery Law*, COMPLIANCE WEEK (Apr. 12, 2011), available at <http://www.complianceweek.com/china-passes-anti-bribery-law/article/200165/>. However, the amendment consists of only one sentence, stating that “[w]hoever provides property to a foreign official or an official of an international public organization for the purpose of seeking an improper commercial benefit, will be punished [in accordance with the provisions applicable to commercial bribery].” *Id.* Although the law does not include an express exemption for facilitating payments, it remains to be seen how this new provision will be interpreted.

⁷ OECD, *Phase 1 Report on Implementing the OECD Anti-Bribery Convention in the Russian Federation*, at 8 (Mar. 2012), available at <http://www.oecd.org/dataoecd/10/40/49937838.pdf> (noting that Russia enacted its anti-bribery legislation on May 4, 2011). However, under Russian law, “there is no criminal liability for the ‘preparation’ of a payment less than 150,000 Roubles in order to induce the foreign public official to take an action other than a ‘knowingly illegal action.’” *Id.*

⁸ Jon Jordan, *The OECD’s Call for an End to “Corrosive” Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 921 (2011).

⁹ *Id.* at 921–22.

¹⁰ See, e.g., Thomas Fox, *The End is Nigh for Facilitation Payments—Get Ahead of the Breeze*, LEXISNEXIS (Jan. 9, 2012, 4:44 PM), <http://www.lexisnexis.com/community/corpsec/blogs/fcpa-law-blog/archive/2012/01/09/the-end-is-nigh-for-facilitation-payments-get-ahead-of-the-breeze.aspx> (“You don’t need a weatherman to know which way the wind blows and the direction of that breeze you feel at your back about now is clearly running against allowing the facilitation payments to continue.”); see also Cheryl A. Krause & Elisa T. Wiygul, *FCPA Compliance: The Vanishing “Facilitating Payments” Exception?*, 2 FIN. FRAUD L. REP. 673, 730 (2010), available at http://www.dechert.com/FCPA_Compliance_The_Vanishing_Facilitating_Payments_Exception_09-01-2010/.

enforcement actions, by appearing to punish behavior that is lawful under the FCPA, exacerbate some of the existing ambiguity in the law and may even raise due process concerns. This trend also appears to be having a chilling effect on corporate activity by compelling some corporations to cease all facilitating payments—expenditures explicitly *permitted* by U.S. law. It is beyond argument that Congress never intended this result, and surely international actions cannot outlaw conduct under U.S. law in the face of an express statute authorizing such conduct. It is therefore important that the SEC and the U.S. Department of Justice (DOJ), the dual enforcers of the FCPA, reassure corporations that facilitating payments are lawful and will not be punished or otherwise subject a company to undue governmental scrutiny. DOJ, in particular, has an opportunity to do so soon, as it plans to issue clarifying guidance on the FCPA this year.¹¹ Clear guidelines from DOJ on this point would reaffirm Congress’s intent and ensure the continuing robustness of the facilitating payments exception.

II. WHAT PAYMENTS QUALIFY AS “FACILITATING” OR “EXPEDITING” UNDER U.S. LAW?

Although the FCPA in its original form lacked an express exception for facilitating payments, Congress “deliberately cast” the language of the bill to “differentiate between” corrupt bribes intending to induce the recipient to use his or her influence to affect an act or decision of a foreign official “and facilitating payments, sometimes called ‘grease payments.’”¹² First, Congress used the word “corruptly” in the statute to distinguish between prohibited bribes and “those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”¹³ Second, Congress excluded from the definition of “foreign official” those “government employees whose duties [were] essentially ministerial or clerical.”¹⁴

In addition, the legislative history offered clear examples of the types of conduct that Congress intended to exempt from the scope of the FCPA. According to the House Report, these included “gratuit[ies] paid to a customs official to speed the processing of a customs document” and “payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity [be] performed in any event.”¹⁵ The Senate Report also provided examples of exempted

¹¹ Lanny A. Breuer, Assoc. Attorney Gen., Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) [hereinafter Breuer Address], *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html> (promising the release of “detailed new guidance on the [FCPA’s] criminal and civil enforcement provisions” in 2012).

¹² H.R. REP. NO. 95-640, at 7 (1977).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

facilitating payments, including “payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.”¹⁶

Although the facilitating payments exception has been part of the law since its inception, the current language was added as part of the 1988 amendments.¹⁷ In enacting the 1988 amendments, however, “[b]oth houses insisted that their proposed amendments only clarified ambiguities ‘without changing the basic intent or effectiveness of the law.’”¹⁸ As such, these amendments only served to make the facilitating payments exemption an express part of the statute.

The statute now explicitly exempts from the scope of the FCPA “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”¹⁹ In addition, in its present form, the statute helps clarify the issue by defining the term “routine governmental action” and by providing a non-exhaustive list of exempted payments:

The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.²⁰

The statute, however, provides that:

[T]he term . . . does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the

¹⁶ S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

¹⁷ 15 U.S.C. § 78dd-1(b) (1998); 15 U.S.C. § 78dd-2(b) (1998); 15 U.S.C. § 78dd-3(b) (1998); S. REP. NO. 100-85, at 53 (1987); H.R. REP. NO. 100-40, pt. 2, at 77 (1987).

¹⁸ *United States v. Kay*, 359 F.3d 738, 750 (5th Cir. 2004) (citing S. REP. NO. 100-85, at 53 (1987) and H.R. REP. NO. 100-40, pt. 2, at 77 (1987)).

¹⁹ 15 U.S.C. § 78dd-1(b) (1998); *see also* 15 U.S.C. § 78dd-2(b) (1998); 15 U.S.C. § 78dd-3(b) (1998).

²⁰ 15 U.S.C. § 78dd-1(f)(3)(A)(i)–(v) (1998); *see also* 15 U.S.C. § 78dd-2(h)(4)(A) (1998); 15 U.S.C. § 78dd-3(f)(4)(A) (1998).

decisionmaking process to encourage a decision to award new business to or continuing business with a particular party.²¹

DOJ has noted that “[t]he statute is unique in comparison to other criminal statutes in the amount of detail it provides in defining these provisions.”²² Nonetheless, despite legislative attempts to delineate the contours of this exemption clearly, some ambiguity has persisted. For example, the legislative history indicates that the application of this exception should largely turn on whether the payment was made to facilitate a discretionary or non-discretionary government function.²³ But some of the examples of qualifying payments provided for by the statute are not necessarily “non-discretionary,” such as the provision of police protection. Therefore, the discretionary/non-discretionary distinction may not always be definitive. Nor is the line between discretionary and non-discretionary functions always clear as a practical matter, so as to provide a definitive answer in all situations to companies seeking to comply with the FCPA.

Additional ambiguity has also been introduced by both the courts and by DOJ in published statements. First, the Fifth Circuit has determined that “routine governmental action does not include the issuance of *every* official document or *every* inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.”²⁴ This seems to be an overly cramped reading of the statutory exception, using the examples in the statute as exclusive categories.

Second, although DOJ has opined that the application of the exception does not expressly turn on the magnitude of the payment, it contended “that a routine governmental action could be rendered corrupt where the size of the payment thereof is inappropriately large.”²⁵ Indeed, the Fifth Circuit echoed this view in dictum, characterizing facilitating payments as covering only “smaller” payments.²⁶ But the FCPA does not require that facilitating payments be small, and indeed, the logic of the exception itself does not seem to turn on the value of the improper payment. Rather, the key inquiry is the role of the recipient and the action being sought by the payor.

²¹ 15 U.S.C. § 78dd-1(f)(3)(B) (1998); *see also* 15 U.S.C. § 78dd-2(h)(4)(B) (1998); 15 U.S.C. § 78dd-3(f)(4)(B) (1998).

²² DEP’T OF JUSTICE, RESPONSE OF THE UNITED STATES SUPPLEMENTARY QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY (May 21, 2010), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf> [hereinafter RESPONSE].

²³ H.R. REP. NO. 95-640, at 7 (1977).

²⁴ *United States v. Kay*, 359 F.3d 738, 751 (5th Cir. 2004).

²⁵ OECD, *United States: Review of Implementation of the Convention and 1997 Recommendation*, at 8 (Apr. 1999), *available at* <http://www.oecd.org/dataoecd/16/50/2390377.pdf>.

²⁶ *Kay*, 359 F.3d at 747.

This gloss on the FCPA, limiting the reach of the facilitating payments exception, appears to unduly narrow the carve-out Congress intended. More significantly, however, *practically* it could cripple the entire exception: Corporations subject to the FCPA are becoming more reluctant to allow *any* such payments given the increased uncertainty in the exception's contours. Indeed, one survey of corporate counsel found that 80% of U.S. companies prohibit the use of facilitating payments.²⁷ Another study reported that more than 70% of surveyed corporations "either never, or only rarely, make facilitation payments, even if their corporate policy permits facilitation payments."²⁸ But Congress clearly did not craft the FCPA to be penumbral, as the 1988 amendments demonstrate. Therefore, the trend toward corporations prohibiting such payments out of fear of unwarranted FCPA prosecution is troubling.²⁹

Further, setting to one side such concern over any potential damage this uncertainty may do to U.S. business interests, vagueness in criminal law can pose a serious due process problem. As the Supreme Court has observed, "[v]ague laws may trap the innocent by not providing fair warning."³⁰ Indeed, any such failure by the "government [to] articulate its aims with a reasonable degree of clarity" should trouble law enforcement and the general public alike, not just the multinational corporations that worry about undue prosecution.³¹

III. INTERPRETATION OF THE FACILITATING PAYMENTS EXCEPTION IN ENFORCEMENT ACTIONS

Focusing corporations' attention further on this dangerously murky area is the government's enforcement of the law. Somewhat ironically, DOJ has explained that it has a limited role in interpreting this exemption, stating that "[i]nvestigatorial and prosecutorial discretion does not play a role in the treatment of facilitation payments."³² Instead, "a payment . . . to facilitate [a] routine action . . . does not fall within the scope of the FCPA; where [the payment] is to secure a discretionary action, it does."³³ Nonetheless, DOJ seems

²⁷FULBRIGHT & JAWORSKI L.L.P., FIFTH ANNUAL LITIGATION SURVEY FINDINGS (2008), available at http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=7637&site_id=286.

²⁸TRACE ANTI-BRIBERY COMPLIANCE SOLUTIONS, TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (2009), available at <https://secure.traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf>.

²⁹There are, of course, a number of other reasons why a corporation may wish to prohibit facilitating payments. Most notably, such payments may be illegal in the foreign country in which the company does business. While respect for local laws is admirable, clearly this trend is more attributable to zealous FCPA enforcement than to any amplification of local law enforcement efforts.

³⁰Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

³¹Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984).

³²RESPONSE, *supra* note 22.

³³*Id.*

to have exercised considerable discretion in interpreting this exemption narrowly by penalizing conduct that appears to fall squarely within the enumerated examples provided by Congress. Indeed, several U.S. enforcement actions have demonstrated the extent to which U.S. prosecutors may be taking an unduly narrow view of the facilitating payments exception, thwarting Congress's intent regarding the provision's implementation.

DOJ's treatment of the Westinghouse Air Brake Technologies Corporation (Wabtec) case is particularly notable in this regard. In 2008, DOJ entered into a non-prosecution agreement (NPA) with Wabtec, under which the company agreed to pay a \$300,000 penalty.³⁴ According to the agreement, Wabtec violated the FCPA by making four types of "improper payments," including those made to "schedule pre-shipping product inspections; obtain issuance of product delivery certificates; and curb what [the company] considered to be excessive tax audits."³⁵ As previously mentioned, under the plain terms of the statute, payments made to facilitate or expedite "scheduling inspections associated with contract performance or inspections related to transit of goods across country" are expressly exempted from the application of the FCPA's anti-bribery provisions.³⁶ Nevertheless, the conduct penalized by the NPA is described in language almost identical to that used in defining a routine governmental action. The NPA states that Wabtec "routinely made unlawful payments," including payments to ensure that foreign agency inspectors "would schedule and perform inspections" of "finished products prior to shipping."³⁷ Moreover, the NPA alleges that the company made improper "clerical payments to receive delivery receipts," which were required "[a]s part of its contract performance."³⁸ If these types of payments do not qualify for the facilitating payments exception, it is difficult to discern which types of payments could.

As another example, DOJ charged Vitusa Corporation with an FCPA violation because the company made a payment to a government official of the Dominican Republic to obtain a payment owed to Vitusa under contract.³⁹ After full performance under a contract to supply milk powder to the Dominican government, Vitusa sought payment from the government as delineated in the

³⁴ See Press Release, Dep't of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay \$300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), *available at* http://www.justice.gov/opa/pr/2008/February/08_crm_116.html.

³⁵ *Id.*

³⁶ 15 U.S.C. § 78dd-1(f)(3)(A)(iii) (1998); *see also* 15 U.S.C. § 78dd-2(h)(4)(A)(iii) (1998); 15 U.S.C. § 78dd-3(f)(4)(A)(iii) (1998).

³⁷ Westinghouse Air Brake Technologies Corp., Non-Prosecution Agreement, at 2-4 (Feb. 8, 2008), <http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf>.

³⁸ *Id.* at 4.

³⁹ See *United States v. Vitusa Corp.*, Cr. No. 94-253-MTB (D.D.C. July 28, 1994), *available at* <http://fcpa.shearman.com/files/e4e/e4ee6f74f542be088fae62662ca45f4b.pdf?i=8d69be164ca238263b35a3ed201caefd>.

contract.⁴⁰ However, although it acknowledged the debt, the government demanded a “service fee” to process the payment.⁴¹ Even though Vitusa paid the requested fee merely to expedite a payment that the government was contractually obligated to make, DOJ nonetheless charged Vitusa with an anti-bribery violation of the FCPA.⁴²

Again, for corporations committed to compliance with the law, these enforcement actions could lead to the conclusion that they should not make facilitating payments—even though Congress specifically provided that such payments are fully legal under U.S. law.

IV. CONCLUSION

DOJ has an opportunity to address the confusion caused by its enforcement actions and the past interpretation of the facilitating payments exception by confronting this issue head-on in its much-anticipated guidance on the FCPA due this year.⁴³ To ensure that corporations feel free to fully avail themselves of this carve-out as Congress intended, DOJ should consider how to revive the exception. One possibility would be to expand upon the list of “routine governmental actions” provided in the statute and assure corporations that DOJ will presume any such payments qualify for the exception. Such clear guidance could comfort businesses that they may make facilitating payments without risking prosecution and reaffirm the viability of this important exception to the FCPA’s proscriptions.

⁴⁰ See *United States v. Vitusa Corp.*, Cr. No. 93-253-MTB (D.N.J. Apr. 13, 1994), available at <http://fcpa.shearman.com/files/e4e/e4ee6f74f542be088fae62662ca45f4b.pdf?i=8d69be164ca238263b35a3ed201caefd>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Breuer Address, *supra* note 11.